United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.........................

LOUIS HAMBURGER and SAMUEL HAMBURGER,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I.

OPINION BELOW

The Circuit Court of Appeals did not render an opinion in this case. The order of the Court is reported at 147 F (2d) 856.

The findings of fact and opinion of the Tax Court were in memorandum form, unreported. They may be found at pages 87-97 of the record.

II.

JURISDICTION

Certiorari is prayed and jurisdiction is invoked under 28 U. S. C. 347.

III.

QUESTIONS INVOLVED

1. After the creation of the trusts did the Petitioners retain such rights as to be the equivalent of ownership of the property transferred within the meaning of Section 22 (a) of the Internal Revenue Code so that the income from such property remained taxable to the Petitioners?

2. Under Section 181-183 of the Internal Revenue Code, may Petitioners be taxed for the share of partnership income belonging pursuant to a written partnership agreement to the other partners?

3. Is ownership of trust property where the facts are undisputed a question of law within the scope of review by the Appellate Courts on appeal from the Tax Court?

IV.

ASSIGNMENTS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decisions of the Tax Court.

2. The Circuit Court of Appeals erred in failing to make an independent determination of the questions of law of ownership of the trust property.

3. The Circuit Court of Appeals erred in holding the income of the trusts taxable to Petitioners under Section 22 (a) I. R. C.

4. The Circuit Court of Appeals erred in failing to tax the income of the partnership in accordance with the provisions of Sections 181 to 183 I. R. C.

5. The Circuit Court of Appeals erred in holding that the income of the trusts was taxable to Petitioners under *Helvering v. Clifford*, 309 U. S. 331.

6. The Circuit Court of Appeals erred in holding that the income of the trusts was taxable to Petitioners because the Settlors reserved power to change the beneficiaries.

7. The Circuit Court of Appeals erred in holding that the income of the trusts was taxable to Petitioners because the trusts were concurrent.

8. The Circuit Court of Appeals erred in holding that the income of the trusts was taxable to Petitioners because of control factors when such elements were incidental to the partnership relationship.

9. The Circuit Court of Appeals erred in denying legal effect for tax purposes to the actual, existing and operating partnership.

10. The Circuit Court of Appeals erred in taxing to Petitioners the capital gain on liquidation of the corporation which was an increment to the trusts only.

11. The Circuit Court of Appeals erred in failing to recognize that powers of the trustees and of the settlors were powers in trust for the benefit of the trusts only.

12. The Circuit Court of Appeals erred in holding that the income of the trusts was taxable to Petitioners because one of the Petitioners had at some time borrowed from the trusts.

13. The Circuit Court of Appeals erred in failing to hold that an unexercised power in settlor to change beneficiaries does not cause the income from the trusts to be taxable to Petitioners.

14. The Circuit Court of Appeals erred in failing to consider local rules of property and trust administration regarding the legal effect of the terms of the trusts and powers of the trustees and settlors.

V.

ARGUMENT

A.

THE SETTLORS HEREIN DID NOT REMAIN THE OWNERS OF THE TRUST PROPERTY AND ARE NOT TAXABLE ON THE INCOME THEREFROM UNDER SECTION 22 (a) I. R. C. AND HELVERING v. CLIFFORD, 309 U. S. 331

1. *Complete Transfer of Title:*

The title to the trust *res* was completely transferred to the Trusts carrying with it the right of the trusts to the income. The Settlors retained neither title nor income of the trust *res.*

2. *Length of Trusts:*

These trusts are not term trusts. They extend even beyond the life of the settlor, and such extension was a material inducement in the creation of the trusts, as the grantor desires to provide a minimum income for the beneficiaries of his trusts during that period of need which would follow the settlor's death, with its consequent removal of the support which he had, during his lifetime been rendering to them out of the compensation he received for his services to his business.

The trust period is the longest period for which, under the applicable Michigan Statutes governing perpetuities and restraints on alienation, real property can be retained in trust, that is, a period measured by two lives in being at the time of the creation of the trust, Section 12935, Compiled Laws of Michigan, 1929. Upon the expiration of this period, the trust property was required to be transferred by the Trustee to the beneficiary and could not pass to the settlor or his estate.

3. *No Reversion to Settlors.*

The settlors retained no reversionary rights, possibility of reverter or any other interest upon termination of the trust. While the trust continued, it was specifically provided that none of the income or *corpus* of the trust should be used to satisfy any obligation of the settlor or for the support, maintenance or education of the wife or child of the settlor, nor distributed to the settlor or his estate directly or indirectly (R. 111).

4. *Settlors Retained No Substantial Property.*

The settlor did not retain any substantial amount of property after each created the trusts. Each grantor parted with substantially all of his property. That which he retained; his home, insurance in modest amount, carrying the liability of periodic premium payments, was property of a sort over which the settlor's ownership was limited, either being joint as in case of the homestead, or property in which he would never benefit, as the insurance, which was actually coupled with a liability with respect to which the settlor would probably obtain no benefits, and which had continued burdens of liability. Neither was the class of property which gives economic satisfactions of control, and neither was income-producing property which could result in economic benefits.

5. *Economic Necessity Dictated Choice of Trustee.*

The trust property consisted of shares of stock in a corporation engaged in the waste material business which business had been started by Louis Hamburger and Samuel Hamburger as co-partners in 1926 and had been managed by them ever since. If a complete stranger had been named as Trustee, economic necessity would have required that such stranger employ Samuel Hamburger and Louis Ham-

burger as the managers of the trust estate. Control and power over the trust estate in Louis and Samuel Hamburger was, therefore, incidental, and inherent in the nature of the property itself. In all probability, it would have existed by necessity even though not expressly provided for by the trust agreements.

6. *Powers of Control in Trustee Were Only Powers in Trust.*

The control given to the Trustee in the trust instrument was expressly restricted in that such control should be exercised for the purpose of creating the greatest income from the trust estate and increasing the value of the trust property (R. 108). The trust agreement contained no exculpatory clauses in favor of the Trustee which are common in trust agreements.

7. *Provisions Excluding Settlor From Any Benefit Specific, Definite and Extensive.*

The trust instrument expressly, extensively and directly prohibited the settlor or his estate from directly or indirectly benefitting from the trust, such provision being:

> "10. That the said Settlor or his estate shall not directly or indirectly become vested or revested with any legal or beneficial interest in the trust property or its proceeds, either of income or principal, nor shall any income, principal, or interest, beneficial or legal, in the trust property be held or accumulated for future distribution to the Settlor or to his estate, nor shall the same be distributed to Settlor or to his estate, nor shall any part of the principal, income, or proceeds of the trust property, or any part thereof, ever be applied to the payment

> of premiums upon policies of insurance upon the life of the Settlor, nor be used or applied for the support of the Settlor or for the benefit of Settlor or his estate, nor used to satisfy any obligation of the Settlor or his estate."

The right of the settlor to change the beneficiary was likewise limited in that "the settlor shall have no power to name himself or his estate as beneficiary hereunder" (R. 111). Moreover, in paragraph 14 it is expressly provided: "nor shall there be any power on the part of anyone to revest in the Settlor or his estate any part of the corpus of the trust" (R. 112).

8. *The Trust Is Irrevocable and Unalterable.*

The declaration of trust expressly provides that it is "irrevocable and there shall be no power to terminate, alter or amend this trust instrument" (R. 111).

9. *Trustee Compensation Must Be Reasonable.*

The trust instrument specifically limited the Trustee to only reasonable compensation for his services as Trustee under paragraph 5 (R. 109). Under no circumstances can Trustee or his estate receive anything out of the trust estate except reasonable compensation for services performed.

10. *Trustees Required To Give Detailed Annual Accountings.*

The Trust instrument (Par. 6) requires the Trustee to annually furnish itemized account showing receipts, disbursements, sales, exchanges, compensation retained by Trustees and all other important financial transactions to the beneficiary (R. 109, 110).

11. *Unexercised Power of Settlor to Change Beneficiaries Prohibited Settlor or His Estate From Benefitting Thereby, Would Be Exercised, if at all, Only to Change Shares of Children.*

The power of Settlor to change beneficiaries provided for in Paragraph 9 expressly limited such power to naming persons other than the Settlor. It contained an express provision that the Settlor should have no power to name himself or his estate as beneficiary (R. 111). It provided that Settlor or his estate shall not directly or indirectly become vested with any legal or beneficial interest in the Trust Res or in any accumulations. It prohibited use of Trust Res to purchase insurance policies on the life of the Settlor or to pay any obligations of the Settlor or for the support of Settlor (R. 111). It further provided that none of the moneys paid to the beneficiaries shall be used for the support or maintenance of the wife or child of Settlor nor for the support of any person whom the Settlor has any obligation to support or maintain, paragraph 4 (R. 109). The trust was irrevocable, paragraph 14 (R. 112).

The power to change beneficiaries was never exercised at any time (R. 63). None of the Trust income was used for the support of wife or children (R. 78). Settlors retained practically no property (R. 61). The Trusts were entitled in the name of the wife and the children, provided for the minimum payments after death of the Settlor, contained spendthrift provisions, all of which indicated that if the power was exercised at all, it would be exercised only to change the shares. The purpose of creating the Trusts was to protect the Settlor's families (R. 64-66).

The effect of the power of the Settlor to change beneficiaries as to taxability of Settlor on the income earned by the Trusts will be later discussed at length. It suffices at this point to point out the above circumstances and the

fact that the contest here is as to whether the Settlor or the Trusts were the owners within the meaning of Section 22(a), and that whoever the beneficiaries were is of no consequence so far as the Trusts were concerned. The Trusts would remain the owners, irrespective of who the beneficiaries were which would be of importance only in the event a contest should arise between the Trusts and the beneficiaries as to who, as between them, would be the owner, under Section 22a.

12. *Power To Accumulate.*

The power to accumulate in the Trusts was retained by Settlor, but under the Trust instrument none of such accumulations could ever be used for the benefit of the Settlor, his estate, or to pay the Settlor's obligations. Minimum payments to beneficiaries after Settlor's death was required.

This Court is, of course, completely cognizant of the principle and rationale of its decision in the Clifford case, and is also aware of the confusion and conflict in the application of it by the lower courts to varying fact situations. We will not burden the Court with a repetition of the analysis of that decision other than to point out that not one of the three elements of reversion, short term and control apply to the trusts in this case. The purported application of the decision to these trusts is founded entirely upon extensions of the decision by the lower courts to other situations and combinations of factors

If the Clifford case applies here, it is because it is far more far reaching than its decision and than this Court has held in any subsequent case. It must be because the lower court construes the Clifford case rule as taxing income to the settlors from long term trusts and income

from trusts with an unexercised power to change beneficiaries to persons other than the settlor. The Clifford decision did not so hold. The language and ratio *decidendi* of that case does not say so or even so imply. The only subsequent decision of this court on the subject, *Helvering v. Stuart*, 317 U. S. 154, indicates to the contrary for the trusts there involved were concurrent and there was power to change the beneficiaries, yet the only Stuart trusts whose income was held taxable to the grantor were those for support.

We must therefore turn to the underlying philosophy of the Clifford case and consider its applicability. First, it must be remembered that Congress has established a system for taxing the income from trusts which is definite in recognizing the separate taxability of trusts as entities. Sec. 161-165, I. R. C. Congress has also specifically provided for the taxation to the grantor of income from trusts where he can recapture the corpus (Sec. 166 I. R. C.) and obtain the income or its immediate use (Sec. 167 I. R. C.). Therefore any reallocation of income by a court decision not in accordance with the framework of this fairly complete statutory scheme requires strong reasons. This Court found such reasons in the Clifford situation to bring into play the wide sweep of Sec. 22 (a) I. R. C., a decision with which there can be no quarrel since it is obvious that a short term trust with a reversion approaches revocability in practical effect, particularly when coupled with extensive control factors.

The situations specified in Sec. 167 where the grantor remains taxable on the income are cases where the grantor obtains or may obtain the income *immediately*, or applies or may apply it to the satisfaction of an obligation measurable in money. Should courts create new subdivisions of that section to apply its rule to intangible, remote, in-

direct and moral satisfactions not measurable in money? Congress has not seen fit to do so, and it is peculiarly within the province of the legislative body. It must not be forgotten that these settlors have permanently parted with title to the property and use of the income. They have created a legal situation which is irrevocable and which deprives them completely and forever of the corpus and income. The decision below taxes them on income they can never obtain actually or for use. The tax on the trust income plus their own income is more than the income they can command to pay the tax. That fact alone is proof that Congress could not have intended such an unjust impasse. In all the situations of Sec. 167, the settlor either receives the income or applies it to his use so that he may fairly be chargeable with tax on it—in effect or actually he may use it or its equivalent to pay his tax. Here the settlor has no possibility of obtaining the income or using it and can not possibly use it to pay his tax.

1. Power to Change Beneficiaries

It would be fruitless to analyze the myriad of decisions under the Clifford case. The circumstances vary infinitely. The inevitable conclusion to be drawn is that the lower courts have in one situation or another, while stressing unduly one of the three factors, taxed the income to the grantor when the term was long or when there was no reversion or when only control factors existed, although this Court's decision required the existence of all three factors. In addition, the lower courts have taxed the income to the settlor when none of the factors of the Clifford case were present, thus creating some new factors of their own, and invading the province of Congress. An example of this is *Commissioner v. Buck,* 120 F. (2d) 775 (CCA 2), and *Brown v. Commissioner,* 131 F. (2d) 640

(CCA 3). The Buck case was a situation where the grantor having retained the power to change beneficiaries, retained very substantial property outside of the trust, and the wife beneficiary employed the trust income to pay premiums on policies insuring the grantor's life. The trust term was short. In the Brown case, the power of change was exercised, and there was a reversion. In neither of these cases was there present the terms of the trusts of this case that change of beneficiaries would be only a shifting among the existing beneficiaries. This is clear from the after-born children clause, the spendthrift clause and the minimum payment clause. The Buck case has been somewhat curtailed by a later decision in the same circuit—*Phipps v. Commissioner*, 137 F. (2d) 141 (CCA 2).

This Court has not considered the power to change beneficiaries to be decisive for taxation because that power existed in *Helvering v. Stuart,* 317 U. S. 154, and the only trusts held taxable to the grantor were for support. Furthermore, in *Helvering v. Safe Deposit and Trust Co.,* 316 U. S. 56, this Court held that an unexercised power of appointment was not taxable under Sec. 811, I. R. C., the general gross estate clause similar to Sec. 22 (a) I. R. C. governing gross income. This Court therefore recognized the significance of the non-exercise of a power and would logically decline to bring a trust with an unexercised power to change beneficiaries under Sec. 22 (a) I. R. C. Congress by the 1942 Act amended the Internal Revenue Code to make property passing under an unexercised power of appointment includible in the gross estate. Sec. 811 (f) I. R. C. It is to be noted that certain powers were exempted —to appoint to descendants, spouse, etc., and that a period of grace was given, and successively extended, during which the powers could be released tax free. (Sec. 403 (d) Revenue Act of 1942). Thus this Court properly left the taxa-

tion of unexercised powers to Congress, and Congress exercised its power to tax with restraint, granting certain exemptions, and it avoided the inequity of application to existing instruments by giving the period of grace for tax free release. And by Section 826 (d) I. R. C. the estate may recoup the tax so paid from the beneficiaries while here the settlor must pay the tax without any right of reimbursement. It is respectfully submitted that in the income tax field also the imposition of a tax should be left to Congress, which would apparently give relief against the retroactivity which is so harsh in the situation at bar where the trusts were created before the Clifford decision and all the subsequent elaborations of it.

It may also be observed that the power to change beneficiaries is not a right to corpus under Sec. 166 or immediate right to income or its use for discharge of obligations under Sec. 167. It is a satisfaction which is not measurable in money, and not within the statutory framework. That Congress is not indifferent to its province in specifying taxable incidents under Sec. 167 is apparent from the amendment made by Sec. 134 (a) of the Revenue Act of 1943 (Sec. 167 (c) I. R. C.) passed after the decision in *Helvering v. Stuart,* 317 U. S. 154, which limits the taxability of income from trusts for support to that actually employed for maintenance.

Great weight should be given to the article on this subject by Roswell Magill, former Under Secretary of the Treasury. In "What Shall We Do With the Clifford Case," April, 1945 Taxes, p. 290, 299, he takes the position that the power to change beneficiaries does not justify taxing the income to the settlor, stating it as follows:

> "The case of power to shift income among beneficiaries or to change beneficiaries has the same statutory background. Congress did not cover this

type of trust in Section 166, and it did exercise its legislative powers specifically in similar situations. Granted that the possession of these powers gives the settlor an important form of control, Congress apparently did not think them great enough to justify taxing the settlor on the income. Obviously he cannot by the use of his powers obtain the money to pay the tax; nor can he get the property back."

2. Concurrent Trusts

Each of the petitioners made his brother the trustee of his trusts. The Tax Court concluded from this that the control situation was the same as though each had continued to be the owner of the property transferred. This doctrine is not founded upon any court decision. The only case cited by the respondent in his brief in the Circuit Court was "Cf. *Lehman v. Commissioner,* 109 F. (2d) 99," an estate tax case where reciprocal powers to withdraw resulted in a taxable transfer of the amount subject to withdrawal—and there each settlor created a trust for his brother and his brother's children, not for his own children, as here. That case involves reciprocity of beneficiaries and powers of withdrawal—our case involves only reciprocity of the powers of trustees. It is possible to assert that a right to withdraw from A's trust is equivalent to a retention of that amount from B's own trust, when B dies. But it is not possible to assert that A's powers as trustee of B's trust are equivalent to his having retained such powers as settlor of his own trust, when he actually has no such powers over the property he has transferred, and he must use his powers as trustee of his brother's trust for the benefit of the trust, both expressly by the terms of the instrument and as a matter of local law of trusts. To apply the reciprocal theory here is to assume more than a breach of trust, it is to assume that the two brothers will

join in a conspiracy in breach of trust, a disloyalty both to his own and his brother's children, in abrogation of the very trusts they have just carefully created.

This Court has answered this question in *Helvering v. Stuart,* 317 U. S. 154, where concurrent trusts existed, but that feature was given no tax significance whatsoever.

It is important to note that all powers of control and management are in petitioners each as trustee of the brother's trust, not as settlor (except the power to change beneficiaries, discussed above) and hence any claim of applicability of control doctrines of the Clifford case and the cases which purport to follow it erroneously assumes the reciprocal trusts theory is effective.

Even if the settlors were trustees of their own trusts, it is now recognized that they hold those powers in trust and can not use them for their individual benefit, *Armstrong v. Commissioner* 143 F. (2d) 700, and *Lowenstein Estate v. Commissioner,* 3 T. C. 1133 and hence have no tax significance. Moreover the trust instruments here expressly so provide.

3. Power to Borrow

The Tax Court apparently attached considerable importance to the fact that one petitioner borrowed from the trusts. It does not appear when this occurred, or whether it occurred in any of the years involved or that the amount exceeded the credits due the petitioner under the partnership agreement, or that the other petitioner ever borrowed. The prohibition against settlor benefitting from the trust precludes authority to borrow, but if there was any such authority loans would have to be on ample security and at fair interest. *Philip Meyers v. Commissioner,* Tax Court

Memorandum Opinion, May 17, 1944 (CCH Decision 13941 M).

B.

THE PARTNERSHIP MUST BE TAXED UNDER SECTIONS 181-183 I. R. C.

Not only has the respondent, the Tax Court and the Circuit Court ignored the trusts as legal entities, but they have also refused to recognize the partnership and the scheme of taxation established by Congress for partnerships. The family partnership situation is a favorite subject of litigation at the present time. This Court has not yet decided any case where the existence of a partnership has been ignored for tax purposes. It would unduly prolong this brief to analyze the numerous cases. It can be stated that the fortunes of the respondent have varied in this type of litigation, but a generalization can be made that the partnerships have been denied recognition where there is in effect a mere attempt to assign income, where the business is a personal service enterprise with the wives or children making no contribution, where capital is not a factor in the business, or where no *bona fide* partnership is created.

In the instant case, capital is a prominent factor in the business, and all of the capital was furnished by the trust partners. There is no doubt whatsoever that the partnership is a going business with legal and actual existence. A number of cases have recognized the validity for tax purposes of partnerships between settlors and their trusts. Perhaps the leading case is *Commissioner v. Armstrong,* 143 F. (2d) 700 where it is pointed out that the control factors were a concomitant of the partnership relationship. It is to be noted that the trust joining the

partnership gave the taxpayer there majority control of the partnership, while in our case, control of the partnership was equal, so that neither petitioner was in control. Yet the trust income and the partnership income of the trust was not taxable to the settlor. *Hardymon v. Glenn*, 56 Fed. Supp. 269 (W. D. Ken.), specifically holds that I.R.C. 181 and 182 applies to partnerships and that the statutory provisions can not be overcome by the general principles of the Clifford case, even if minimizing or avoiding taxes was the motive for creating the partnership. The Tax Court has taken this stand in *Robert P. Scherer*, 3 T. C. 795, not appealed by the government, where the partners in a highly technical business were the husband and his wife individually and as trustee for minor children. Sec. 181 I. R. C. was applied over the government's claim that *Helvering v. Clifford* called for the application of Sec. 22 (a).

Similarly, *Wachovia Bank & Trust Company v. Commissioner*, Tax Court Memorandum Opinion, June 22, 1944, CCH Decision 14001 (M) The same view is taken in *Montgomery v. Thomas*, 146 F. (2d) 76, (C.C.A. 5), where a partnership between a father and minor sons was recognized and the income taxable to the partners under Sec. 181 I.R.C. and not to the father under Sec. 22 (a) I.R.C. Also the purpose of minimizing or avoiding taxes was held immaterial, and a large loan to the father from the children was recognized by the allowance of an interest deduction, with no effect upon the application of Sec. 181.

The Sixth Circuit has itself upheld the validity of a husband and wife partnership in a very recent decision *Tower v. Commissioner*, April 2, 1945, 45—1 U.S.T.C. Par. 9246. There, as here with the trusts, the wife received stock in a corporation, which was dissolved and a partnership formed. She rendered no services to the

partnership and her receipt of the corporate assets was conditioned upon contribution to the partnership, and the husband alone conducted the business. The business involved was somewhat similar to that in the case at bar—it was an iron works. The Tax Court was reversed.

The conclusion is inevitable that the partnership here involved must be recognized and taxed under Sec. 181 *et seq.* I.R.C. because of its commercial reality, which prevents Sec. 22 (a) applying, and because the Clifford doctrine does not apply to partnerships where family trusts are partners, according to numerous decisions of the Tax Court and Circuit Courts of Appeals. It is respectfully suggested that there is complete merit to that view since the control, short term, and reversion factors of family trusts, which are private and intimate may indeed give an economic equivalent of ownership warranting application of Sec. 22 (a) while a business enterprise which deals with the world at large, is semi-public in its nature and subject to the exigencies of the commercial world, makes control factors of no tax significance, particularly when they are normal concomitants of the partnership relationship and would exist in the petitioners whether the partners were family trusts or strangers.

The control is not in the nature of reservations or strings retained, it is an inevitable accompaniment of the nature of the property transferred—an interest in a business whose most beneficial administration requires the management of those who have created its success. The situation is like *Commissioner v. Betts,* 123 F. (2d) 534 (CCA 7), where the settlor's investment powers were discounted because he had experience in the security business and might therefore have thought his judgment peculiarly valuable. So here the technical competence of the petitioners as managers is necessary for the pre-

servation and accretion of the trust estates. It must not be forgotten that the managing partners are fiduciaries as partners; they can not use their partnership powers for their own benefit; while they may benefit therefrom it is only by increasing the profits of the whole and incidentally their own share of the income, on which and on which alone they are taxable.

The income of the trust-partners, the petitioners can not under any circumstances obtain for themselves, use it for their obligations or benefit, and they have no interest whatsoever in the capital of the partnership except the indirect one of economic motive of so managing it as to cause it to produce more income for the partnership as a whole. They can not benefit themselves without at the same time benefiting the trusts a great deal more with an increment the grantors can not possibly enjoy in any way. Surely such are not the economic satisfactions covered by Sec. 22 (a). A feeling of contentment over the increasing property of members of one's family is not taxable income when the taxpayer can not himself receive any benefit from the increment except the feeling itself, which is certainly of such shadowy monetary value as to be at the vanishing point.

C.

THE DOBSON CASE

This Court is well aware of the importance of its decision in *Dobson v. Commissioner,* 320 U. S. 489, and of the interest of the lower courts in its interpretation and application to tax cases as they come up for review. The problem of its application to the instant case was briefed below and was prominent in the oral argument. From the form of the order of the Circuit Court, it was apparently

the conviction of that Court that the Dobson case required affirmance of the Tax Court. We believe the Court to have erred in that respect, and we have by this judicial abdication been deprived of the independent consideration by the Appellate Court of the questions here involved.

The Dobson case reaffirms the long-standing principle, expressed in the statute itself, that the Circuit Courts may review questions of law determined by the Tax Court. The jurisdictional limitations of the case stem from this Court's holding that many so-called questions of law are actually questions of fact, and that when there are mixed questions of law and fact, the elements must be separated so as to identify a clear-cut mistake of law, else the Tax Court decision stands, and that Tax Court decisions of questions of law are entitled to great weight in a field where the administrative body has special competence.

Is it not clear that where, as here, the facts are undisputed, ownership of trust property is a pure question of law? Of course, the facts and circumstances must be found—every case necessarily presents facts—questions of law do not float in the air. But once the facts are found, their significance in determining whether the Settlor still retained ownership is a clear cut question of law. It is not a mixed question of law and fact; it is of law only. That this is so is apparent from the fact that taxpayers do not find fault with the findings, but with the legal conclusion drawn therefrom. We might have found other facts, or stressed them differently, or phrased them variously, but nevertheless, accepting every fact found as gospel truth, we point to a clear cut error of law—the petitioners do not own the trust property. Even if the question were a mixed one, the legal error can be winnowed out definitely and distinctly without carrying any fact question with it.

Nor is this Tax Court determination of the legal question one in a field in which it has peculiar competency as in the Dobson case itself where step transactions were involved (a technical tax question). Ownership of trust property is peculiarly appropriate for local determination, and peculiarly inappropriate to Tax Court decision, that body not being experienced in local law, but in the technical problems incident to taxation and accounting. The various Circuits are, after all, Appellate Courts of the states in their respective circuits and are accustomed to passing upon general common law and particular local law questions. This Court so held in *Helvering v. Stuart*, 317 U. S. 154. For simplification we have emphasized the question of law of ownership of the trust property, but there is also of equal importance the question of law of the legal existence of the partnership. In the Dobson case "The error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting" 320 U. S. 506, 507. The questions in the instant case are not "only a question of proper tax accounting" unless all tax cases are only that, and this Court does not so hold because it specifically reserves for review questions of law in tax cases.

This Court has not yet had occasion to determine whether ownership of trust property is a question of law open to Court review within the meaning of the Dobson case. The Tenth Circuit has held specifically that it is. *Armstrong v. Commissioner*, 143 F. (2d) 700, and in a partnership-trust case. The conflict in Circuits is squarely presented by the instant case, a conflict that may only be resolved by this Court.

The later decisions of this Court which deal with the Dobson problem indicate that the Dobson jurisdictional limitations do not apply to the instant situation. In

Claridge Apartments Company v. Commissioner, 65 S. Ct. 172, the Tax Court's finding that Sec. 268 and 270 of the Chandler Act (which were revenue provisions) applied retroactively to confirmed reorganizations not finally completed was reversed by this Court, after affirmance by the Circuit Court of Appeals, on the grounds that the question "is obviously one of law, and of a sort not requiring the specialized experience of the Tax Court to determine." *Commissioner v. Lane-Wells Co.*, 321 U. S. 219, merely confirms the self-evident proposition that whether a penalty for not filing a return is to be imposed "is one of fact in the first instance for the Board's determination" 321 U. S. 225. In *Equitable Life Assurance Society of the U. S. v. Commissioner*, 321 U. S. 560, this Court could not "say on the basis of the provisions of policies and the meager stipulation that the excess interest dividends were 'interest' within the meaning of the Act as a matter of law" 321 U. S. 564. In other words, the question was one of law subject to review but the Board's decision was not in error. In *Douglas v. Commissioner*, 322 U. S. 275, this Court reviewed on the merits a question of restoration to income in the year of cancellation of a lease of depletion taken before production on minimum royalties in prior years—thus indicating that the question was one of law. In *Dixie Pine Products Co. v. Commissioner*, 320 U. S. 576 "Since the Board applied the correct rule of law, its determination that the item in question was not properly deducted on the accrual basis is entitled to the finality indicated by *Dobson v. Helvering*." In *Security Flour Mills Co. v. Commissioner*, 321 U. S. 281 "The question is not whether the Board, within its discretion, made a determination of fact. Compare *Dobson v. Helvering*, 320 U. S. 489. It is rather whether, as a matter of law, the Board misconstrued the extent of the power conferred by the Revenue Act." The Board was reversed.

In *Commissioner v. Scottish American Inv. Co.*, 65 S. Ct. 169, the fact conclusion of the Tax Court that the taxpayer had an office or place of business in the United States was not disturbed, because the legal conclusion that followed, that the taxpayer was classified as a resident foreign corporation taxable under Sec. 231 (b) I. R. C. was inevitable, undisputed and required by the statute itself. There was no question of law—there was a command of the statute. This Court said "When the Tax Court's *factual* inferences and conclusions are determinative of compliance with statutory requirements, the Appellate Courts are limited to a determination of whether they have any substantial basis in the evidence." (Italics ours.)

In *McDonald v. Commissioner,* 65 S. Ct. 96, the determination of what constituted deductible ordinary and necessary business expense was held to be a technical tax problem as to which "we should not be inclined to displace the views of the Tax Court with our own." This Court said: "Tax language normally has an enclosed meaning or has legitimately acquired such by the authority of those specially skilled in its application. To speak of tax determination made in the system of review specially designed for federal tax cases as technical is not to imply opprobrium." In the case at bar, there is no "tax language" involved. The statute is silent on our questions of law nor is the Tax Court "specially skilled" in the property tax questions involved. Nor are the decisions of the legal questions "tax determinations"—they are erroneous decisions of local property law.

In *Commissioner v. Court Holding Co.*, 65 S. Ct. 707, "There was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the Court." This Court then proceeded to determine that

the Tax Court's determination of law based upon the facts it found was correct.

The above citations of this Court's expounding of the Dobson principle show that the pure questions of law presented by this appeal lie within the domain of judicial review. The Circuit Court is correct in reciting that there was substantial evidence to support the findings of the Tax Court, but it erred in declining to review the erroneous legal conclusions drawn from those facts and thereby deprived these taxpayers of their fundamental constitutional right to have a federal appellate court review determinations of law by an administrative tribunal.

D.

CONCLUSION

This Court is presented with square conflict between Circuits on both the trust ownership and partnership existence questions. This judicial controversy results in confusion and uncertainty which only this Court can resolve. This case also brings to this Court important questions of public moment in the application of the Clifford principles far afield from their origin—questions which affect many taxpayers and extensive property interests. This petition also raises important questions of federal administrative law in the field of taxation with respect to the scope of review by the courts of the Tax Court's decisions. It is respectfully submitted that this Court should untangle the confused snarl that conflicting lower court decisions have inflicted upon the bar and the tax paying public. While this Court undoubtedly wishes to stem the flood of tax litigation such a desirable result can be best accomplished by taking jurisdiction of an appeal such as this, decision in which will correct the

variations which now becloud the law in this field, and will make much future litigation unnecessary.

Respectfully submitted,

EDWARD S. REID, JR.,
HAROLD M. SHAPERO,
Attorneys for Petitioners.

Dated: May 15, 1945.